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# In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 780

HARRY HAROLD CHERETON, PETITIONER

*v.*

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT*

## BRIEF FOR THE UNITED STATES IN OPPOSITION

### OPINION BELOW

The opinion of the court of appeals is reported at 309 F. 2d 197. The oral opinion of the district court appears in the record at pp. 48a–51a.

### JURISDICTION

The judgment of the court of appeals was entered on October 26, 1962. A petition for rehearing was denied on December 4, 1962. The time to petition for a writ of certiorari was extended by Mr. Justice Stewart to February 1, 1963, and the petition was filed on January 29, 1963. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## QUESTION PRESENTED

Whether an application for a writ of error coram nobis supported by affidavits of four jurors as to their intent in reaching a verdict was properly denied without a hearing.

## STATEMENT

In 1959, in the United States District Court for the Eastern District of Michigan, petitioner was convicted on four counts (counts 2–5) charging the making of false oaths in a bankruptcy proceeding in violation of 18 U.S.C. 152, and was given concurrent sentences of imprisonment for two years on each count. The conviction was affirmed on appeal, 286 F. 2d 409, certiorari denied, 366 U.S. 924.

After the denial of the petition for a writ of certiorari by this Court, petitioner, while still out on bond, filed a motion for a writ of error coram nobis in which he claimed that the jury had not intended to convict him of the substantive counts which had been submitted to them, but intended to convict him of conspiracy, as charged in count one, which had been dismissed at the close of the government's case. That count had charged a conspiracy to commit mail fraud by the use of a false financial statement. Petitioner supported his motion with the affidavits of four jurors to the effect that in announcing guilt on four counts they intended to find petitioner guilty of the four parts of the conspiracy charged in count 1, *i.e.*, (1) false financial statement, (2) using the mails to defraud, (3) defrauding creditors of the defunct corporation, and (4) conspiracy; that they did not intend

to find petitioner guilty of making false statements before the referee in bankruptcy (R. 17a–25a).

The record of the trial showed that the trial court specifically charged the jury that count one of the indictment "which charged this defendant with entering into a conspiracy with the witness Raymond Kaufman has been dismissed by this Court for legal reasons and you are not called upon to decide upon that charge, and you will not, therefore, consider this charge in any manner whatsoever" (R. 2b). Later, when the jury asked for the indictment, the court, with the approval of counsel, manually cut out count 1 from the indictment sent to the jury (R. 4b–5b). When the jury returned its verdict the clerk in open court specifically asked how the jury found as to each count, and the foreman answered as to each count. Thereafter the verdict was read, and the clerk asked: "And so say you all?" The jurors responded "We do." (R. 5b–6b).

The district court denied the motion. While it pointed out the improbability, in the face of the record as summarized above, that the jury would have made any such mistake as that claimed, it decided that the jurors could not impeach their verdict by affidavits or testimony as to the manner in which they arrived at the verdict (R. 48a–51a). The court of appeals affirmed, 309 F. 2d 197.

## ARGUMENT

Aside from any question as to whether the issue which petitioner sought to raise would be cognizable by a writ of error coram nobis (see *United States* v.

*Mayer*, 235 U.S. 55), the rulings of the courts below were clearly correct. It is well settled that the testimony of jurors is not to be received to show matters which essentially inhere in the verdict itself and necessarily depend upon the testimony of jurors impeaching their own verdict. *Hyde* v. *United States*, 225 U.S. 347, 384; *Hendrix* v. *United States*, 219 U.S. 79; *McDonald* v. *Pless*, 238 U.S. 264; see *Stein* v. *New York*, 346 U.S. 156.

The soundness of the rule established by the precedents is well illustrated by the facts of this case. In view of the transcript of the trial, there is serious doubt whether any juror could have been confused as claimed. It is more than doubtful that any jurors who could be thus confused would recollect with clarity alleged deliberations occurring two years before with respect to the elements of a count of the indictment which they had not seen and as to which the judge had not charged.

## CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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FEBRUARY 1963.

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